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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-1076.

JOHN BALLANTYNE,

Petitioner,

v.

CENTRAL RAILROAD OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals appears in Appendix A to the petitioner's brief and as of this writing is yet unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 3, 1972 and the petition for Certiorari was filed within the ninety day appeal period therefrom. The jurisdiction of this court is invoked under the Act of Congress of April 22, 1908, 45 USCA § 51, et seq., as amended.

COUNTER-STATEMENT OF THE QUESTION PRESENTED.

In an FELA case, where the trial court fails to give the jury adequate guidelines as to the necessary mathematical calculations to be used in computing the present worth of future loss of wages, is not a general verdict improper since it is founded upon guess and conjecture?

COUNTER-STATEMENT OF THE CASE.

On May 5, 1965, petitioner, a freight conductor employed by the defendant railroad company, was injured in the course of his duties when he was thrown from a boxcar by the operation of an admittedly defective hand brake. The injuries which resulted were permanent, partially disabling and required three hospitalizations. The petitioner was out of work for approximately twenty months but has returned to work and is working on a daily basis as a passenger conductor. As a result of the aforementioned injuries, the defendant railroad has disqualified petitioner from working as a freight conductor.

At the trial it was stipulated that the petitioner could work for an additional 23 years before reaching mandatory retirement age. There was evidence at the trial that the petitioner was earning approximately $6,250 per year less as a passenger conductor than he would have been earning as a freight conductor. There was admittedly no evidence presented by petitioner as to the interest rates available for safe, conservative investment nor was there any evidence presented as to the manner of calculation or formula involved in reaching the present worth of petitioner's future loss of earnings.

The trial court did not give the jury any guidance whatsoever as to how to compute the future loss of wages to present worth. The most the court did was to make the charge as quoted on pages 3 to 5 of the plaintiff's petition.

The court of appeals in remanding the case for trial on the question of damages alone vacated the judgment of $180,000 because there was no evidence introduced by way of present worth tables or other mathematical formula or computation that the jury could use once it had determined the amount of loss of gross future earnings.

REASONS FOR REFUSING THE WRIT.

1. The Failure of the Trial Court to Furnish the Jury Guidelines as to the Mathematical Calculations to Be Made in Reducing a Loss to Present Worth Clearly Made Any Verdict of Such Jury Based Upon Conjecture and Guesswork.

In remanding the case to the District Court for a new trial on the issue of damages, the Court of Appeals relied upon two of its more recent decisions, *Russell v. City of Wildwood,* 428 F. 2d 1176 (3rd Cir., 1970) and *Haddigan v. Harkins,* 441 F. 2d 844 (3rd Cir., 1970) which had discussed at great length the proper charge to be given a jury to enable it to reduce future loss of wages to present worth.

While both of these cases, *Russell* and *Haddigan,* were diversity cases involving the laws of New Jersey and Pennsylvania respectively, such is of no significance since these cases discussed the proper charge to be given to *any jury* to enable it to calculate present worth and thus remove conjecture or guesswork from any such award.

The court's approach in both of these cases had no relationship to the fact that one was from Pennsylvania and one from New Jersey, other than under the law of each state evidence of the calculations necessary to reach present worth was admissible but had never been held to be essential, similar to the pre-existing law in FELA cases, *Pennsylvania Railroad v. McKinley,* 288 F. 2d 262, 265 (6th Cir., 1961).

In the *Haddigan* and *Russell* cases the Court of Appeals, recognizing that the present worth concept was not an easy rule for a jury to apply and that necessary enlightenment could now be provided on a mathematical basis by the use of the present worth tables, held that thereafter in such cases it would be necessary for the

plaintiff to provide the jury with the evidence to which it was entitled, namely appropriate mathematical guidance on the method of reducing lost future earnings to present worth. Such a rule is obviously applicable to all juries since the underlying philosophy of tort law that allows pecuniary recovery for injuries is the same in FELA cases as in diversity cases.

In effect, the ruling in the instant case by the Court of Appeals is a result of the logical extension of *Haddigan* and *Russell* to distinctly federal suits, thus making the evidential rule uniform for all Third Circuit juries. The logic of this extension is unassailable since if it is improper for a jury in a diversity case to render a verdict based upon guesswork and conjecture, it is equally improper in an FELA case.

Petitioner's citation of *Kelly v. Chesapeake & Ohio*, 241 U. S. 485 (1915) is inapposite since that court at page 491, after recognizing the difficult mathematical computation necessary in reaching present worth, specifically held that the question of whether this difficulty should be met by admitting the testimony of expert witnesses or receiving evidence in table form was not before it at the time. The Court of Appeals in *Russell, Haddigan* and the instant case has in effect made that decision and determined that such evidence was necessary and will be necessary hereafter.

2. The Charge of the Court in Connection With Present Worth Did Not Meet the Required Specificity of the *Russell* and *Haddigan* Decisions.

Petitioner has argued that the mention by the District Court to the jury of the one dollar for one year example was adequate to meet the *Haddigan-Russell* rule. It is

respectfully submitted that a reading of that charge, to which proper exception was taken (A3, footnote 4), clearly indicates that the District Court was merely explaining the concept of present worth and not the mathematical calculations that the jury should follow. This was the conclusion of the Circuit of Appeals which held that the "one dollar due in one year" example included in the charge by the judge demonstrated what *present worth* is but "offered no guidance to the jury as to the proper mathematical calculations required to reduce Ballantyne's lost future earnings covering a 23-year period to their present value" (A6).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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